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Microsoft

VIA EMAIL – dfars@acq.osd.mil

April 1, 2002

Ms. Susan Schneider
Defense Acquisition Regulations Council
OUSD(AT&L)DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 2000-D023

Dear Ms. Schneider:

Please accept the following comments of Microsoft Corporation ("Microsoft") in response to the notice of proposed rulemaking published on January 29, 2002 concerning the above referenced DFARS Case.

Summary

Microsoft has long been a supporter of utilizing enterprise agreements for both commercial and public sector customers recognizing that they represent one of a variety of current contracting techniques that allows customers to obtain needed software in the most efficient and cost-effective manner. DoD has been a leader within the federal government in utilizing innovative commercial mechanisms to acquire needed software on a department or agency-wide basis. Those efforts, as well as the policies set by the Enterprise Software Initiative, have served DoD and the taxpayer well. We are concerned, however, that the proposed regulations do not effectively leverage the efficiencies and benefits of the current procurement regulations and structure of DoD and its budgetary authority. Microsoft supports efforts by DoD policymakers to encourage the use of enterprise agreements whenever it is in the best interests of the government, but does not believe that mandatory regulations that lock DoD users into the use of a particular procurement technique are required or are in the best interests of the government or taxpayers.

I. General Concerns

1. If implemented, the proposed regulations will drastically reduce the number of companies, including numerous small companies, that are able to market and sell Microsoft software to DoD. Those software resellers and systems integrators are valuable partners with Microsoft that often have unique skill sets and provide significant value to both Microsoft and our shared DoD customers. Using the regulatory process in the manner suggested will restrict the number of companies able to sell or resell commercial computer software to DoD.

2. The proposed regulations for selling commercial computer software to DoD customers in a non-standard manner may actually encourage software manufacturers to keep commercial computer software off of enterprise agreements product lists thereby denying both the software manufacturer and the DoD customer the benefits associated with such agreements.

3. The proposed regulations do not address a principal impediment to efficient and cost-effective acquisitions of commercial computer software and related services *within* DoD—the budgetary process. Congressionally appropriated money used for such purchases remains at the DoD customer units, i.e., the office of the Enterprise Software Initiative will not control such funds. As a result, any mandate by the office of the Enterprise Software Initiative is subject to *the* individual vicissitudes of the budget process and congressional mandates. Until DoD is able to control software acquisitions via a single budget line item, the mandate *to* use a single contracting process will be ineffectual. Furthermore, additional resources will be required to manage the proposed regulation and subsequent acquisition procedures. IF industrial funding fees *are* attached to the individual purchases to recoup those administrative costs, my potential savings resulting from increased volumes will be lost.

4. The Enterprise Software Initiative contemplates the widespread use of Blanket Purchase Agreements under the General Services Administration ("GSA") multiple award schedule. That use Will serve only to increase the uncertainty for DoD users and manufacturers with regard to intellectual property rights and software licenses. The GSA schedule Contracts incorporate by reference, as an allegedly standard commercial term, FAR 52.227-14, Rights in Data. Not only does that clause often conflict with commercial computer software licenses that are also incorporated into GSA schedules contracts, the clause differs from DoD policy on intellectual property rights and uses. The proposed rule, if enacted, should follow DoD policy and not GSA policy with regard to rights *in* data.

5. By taking *a* policy directive and making it a mandatory use regulation, the proposed rule creates a basis for additional bid protests on every disputed acquisition of commercial computer software and related services that are on Enterprise Software Initiative agreements but acquired via a separate contract. The incumbent agreement holder will argue that its agreement has become a "requirements" type contract while the separate contract vendor will argue that different terms and conditions or product baskets differentiate the acquisition.

II. Specific Concerns

1. The proposed regulations we the term "commercial software or related services such as software maintenance." At the very least, the proposed regulations should refer to "commercial computer *software"* which is already a defined term in the DFARS. See DFARS 252.227-7014(a) (I). In addition, Microsoft is concerned that *the* phrase "or related services such as software maintenance" is overly broad, undefined, and confusing. There are numerous "services" that are "related" to commercial computer software ranging from very high end architectural design and theory to the more common software implementation services that are currently widely available in the commercial and government marketplaces. Although it would appear that the intent of the proposed regulations is to cover Commercial computer software and software maintenance, the plain meaning of "related services" as used in the proposed regulations is not so limited and in fact, would be construed in a very broad manner. At the very least, the term "related services" should be deleted wherever it is used in the proposed regulations.

2. The proposed regulations use the term "software maintenance" without defining that term other than in the overly broad context of "related services." If the intent of the proposed regulations is to include "software maintenance" to the extent it means those contractual arrangements that permit the customer to remain current with regard to new releases of commercial computer software for an established period of time, the regulations should specifically define and limit the meaning of "software maintenance."

3. The proposed regulations would apparently apply to the acquisition of commercial computer software and related services that *are* "part of a system or system upgrade." *See* 208.7400(a). Although undefined, the term "system" would reasonably include new hardware systems. Read literally, the proposed regulations would require DoD customers to purchase hardware without preloaded software thereby increasing costs to DoD and significantly increasing the risk of software piracy.

4. Section 208.7402 of the proposed regulations would require the acquisition of commercial computer software and related services pursuant to the "Enterprise Software Initiative" which is defined in the proposed regulations as "an initiative led by the DoD Chief Information Officer to develop processes for DoD-wide software asset management." There does not appear *to* be any intent or requirement for DoD to develop those processes pursuant to a public notice and comment procedure. If the processes are not publicly developed they are subject to change without public notice.. This will further complicate currently understood processes and create additional delays and unfulfilled requirements. Additionally, those processes may be inconsistent with the requirements of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, which require contracts for commercial items to include, to the maximum extent practicable, only those clauses required to implement statutes and executive orders or those clauses deterrnined to be consistent with customary commercial practices. See FAR 12.301(a). The mandatory use of such processes is the fundamental defect in any proposal that mandates a particular procurement technique that is not subject to public scrutiny and public policy debate.

5. Proposed section 208.7403 establishes a time consuming process for making acquisition decisions when required commercial computer software is not available through the Enterprise Software Initiative process or the terms and conditions *are* inconsistent with the specific needs of individual DoD units. Those additional processes negate the acquisition streamlining regulations. The basic concept behind the Enterprise Software Initiative is that "one size fits all." However, Microsoft has, in the recent *past*, negotiated numerous enterprise agreements with numerous public sector entities and the reality is that many such customers have differing requirements that need to be considered and negotiated. Adding a 90 day process whereby one DoD entity is essentially negotiating for another DoD entity with no assurance of a positive result thereby possibly delaying the acquisition even beyond the 90 day period should be unacceptable to all those involved. Any economies of scale that would benefit software manufacturers and resellers with the presumption prices will be lower by attempting to accumulate purchases beyond an agency level will generally be lost by the need to continue to negotiate individual agreements to meet specialized needs.

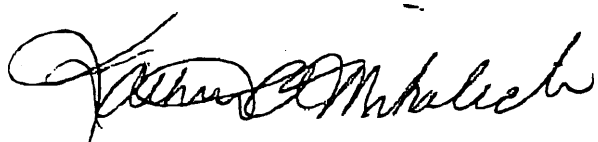
6, Proposed section 208.7403(e) (2) states that in the event: a DoD customer identifies commercial computer software that is available elsewhere that represents an overall best value to the government, the Software Product Manager "will consider adjusting the ESA terms and conditions or prices to reflect 'most favored customer' status." The term "most favored customer status" is not a defined term in the Federal Acquisition Regulation and, in fact, almost all references to "most favored customer" were

eliminated from *the* Federal Acquisition Regulation rewrite that occurred as the result of the enactment of the Federal Acquisition Streamlining Act of 1994. Indeed, the standard for federal pricing has been for years, and remains, as stated at FAR 15.402(a), "fair and reasonable." No justification or authority is presented or established for introducing a highly controversial and vague standard as "most favored customer" and it should be eliminated from the proposed regulations. Indeed, the intent of that new proposed standard points out a fatal flaw in the proposed regulations. It is safe to say that software manufacturers and resellers are willing to sell commercial computer software at deep discounts and pursuant to favorable terms when the customer commits to very large quantities and favorable commercial payment terms. Unfortunately, to date, DoD has had a *very* difficult time doing both. In other words, DoD, as well as other public sector customers have been unable to commit to the quantities that result in the lowest possible prices. There is no data in the record that would support the conclusion that DoD will now be able to commit to larger quantities given the budgetary processes and differing procurement cycles and needs of the various DoD entities.

Conclusion

The policy on which the proposed regulation is based, i.e., the use of enterprise-type agreements should be encouraged throughout DoD, is a sound policy. However, by making it a mandatory regulation covering a broader and more vague array of commercial services and not leveraging efficiencies and benefits of the current procurement regulations and DoD budget authority, the proposed regulation creates delays in acquisition and potentially unfulfilled requirements. Without wholesale changes that address each of the concerns expressed above, the proposed regulation should eliminated,

Respectfully submitted,



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